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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA
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16 UNITED STATES OF AMERICA,) 2:98-cr-00035-HDM-RJJ
17 Plaintiff,)
18 vs.) ORDER
19 BRETT ALLEN HUDSON,)
20 Defendant.)
21 _____)

22 Before the court is the defendant Brett Allen Hudson's
23 ("defendant") petition for a writ of *audita querela* (#111). The
24 government has opposed (#115), and the defendant has replied
25 (#116).

26 On June 16, 1998, defendant was convicted by a jury of bank
27 robbery. He was sentenced on September 17, 1998, to 240 months
28 incarceration. The sentence was imposed after the court concluded

1 that defendant qualified as a "career offender" under USSG § 4B1.1
2 because he was at least 18 at the time he committed the instant
3 offense, and he had at least two prior felony convictions for
4 "crimes of violence." Defendant appealed his conviction. The
5 Ninth Circuit affirmed his conviction and sentence. *See United*
6 *States v. Hudson*, 188 F.3d 516 (9th Cir. 1999) (unpublished
7 opinion), *cert. denied*, 528 U.S. 1098 (2000).

8 On January 8, 2001, defendant filed a 28 U.S.C. § 2255 motion
9 challenging his conviction. Defendant argued that the district
10 court did not have jurisdiction over his bank robbery charge, his
11 attorney was ineffective, and the government used perjured
12 testimony at trial. On May 13, 2002, the court denied the § 2255
13 motion.

14 On March 8, 2006, defendant filed another § 2255 motion, this
15 time challenging his sentence under the Supreme Court's decision in
16 *Shepard v. United States*, 544 U.S. 13 (2005). Defendant argued
17 that *Shepard* created a newly recognized right that was
18 retroactively applicable to cases on collateral review. In its
19 opinion dated July 17, 2006, the court held that the rule
20 pronounced in *Shepard* was a procedural rather than substantive
21 change in the law and that it did not apply retroactively.
22 Defendant appealed. Both this court and the circuit court denied
23 defendant a certificate of appealability.

24 On January 2, 2008, defendant filed the instant petition for a
25 writ of *audita querela*. Although the avenue for relief differs,
26 the argument for relief is identical to that in defendant's second
27 § 2255 motion. Defendant argues he is entitled to relief under
28 *Shepard*, and that *audita querela* is appropriate because no other

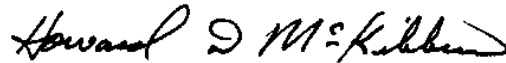
1 postconviction remedy can provide him relief.

2 *Audita querela* is a common law writ used to attack a judgment
3 that was correct when rendered, but that later became incorrect
4 because of circumstances that arose after the judgment was issued.
5 *United States v. Carrington*, 503 F.3d 888, 890 n.2 (9th Cir. 2007).
6 The writ survives "only to the extent that [it fills] 'gaps' in the
7 current systems of postconviction relief." *United States v.*
8 *Valedez-Pacheco*, 237 F.3d 1077, 1080 (9th Cir. 2001). A writ of
9 *audita querela* is not available if the claims raised would be
10 cognizable in a § 2255 habeas petition. *Carrington*, 503 F.3d at
11 890. Further, statutory limits on second or successive § 2255
12 petitions do not create a "gap" in the postconviction landscape
13 that can be filled with *audita querela*. *Carrington*, 503 F.3d at
14 890.

15 The law is clear that a claim cognizable under § 2255 cannot
16 be the subject of a petition for a writ of *audita querela*, nor can
17 *audita querela* be used as an end-run around § 2255's prohibition on
18 second or successive petitions. Here, not only is defendant's
19 claim cognizable under § 2255, it has also already been the subject
20 of a § 2255 petition. Moreover, even if defendant's claim were not
21 cognizable under § 2255, the relief he seeks is not available to
22 him at any rate. Newly announced rules of criminal procedure are
23 presumed to be nonretroactive unless the Supreme Court has
24 specifically held the rule to be retroactive or the new rule is a
25 "watershed rule" implicating the fundamental fairness and accuracy
26 of criminal proceedings. *Schriro v. Summerlin*, 542 U.S. 348, 352
27 (2004); *Tyler v. Cain*, 533 U.S. 656, 662 (2001). The Supreme Court
28 has not held that *Shepard* applies retroactively to cases on

1 collateral review. Moreover, this and other courts have held that
2 *Shepard* announced a procedural rule that is not a watershed change
3 to criminal procedure. Order of July 17, 2006 (#94); see also,
4 e.g., *Corey v. United States*, 221 Fed. App'x 1, at *2 (1st Cir.
5 2007) (unpublished opinion); *Carrie v. Patton*, 2008 WL 466210, at
6 *2 (E.D. Ky. Feb. 18, 2008) (slip copy). The reasoning of the
7 court's earlier order applies with equal force here. Defendant is
8 not entitled to relief under either § 2255 or pursuant to a writ of
9 *audita querela* because *Shepard* cannot be applied retroactively to
10 his sentence. Therefore, defendant's petition for a writ of *audita*
11 *querela* (#111) is denied.

12 DATED: This 14th day of March, 2008.

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15 UNITED STATES DISTRICT JUDGE
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